STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 1, 2010
v	No. 285438 Kent Circuit Court
DENNIS JAY CLARK, Defendant-Appellant.	LC No. 07-005360-FH

Before: STEPHENS, P.J., and GLEICHER and M.J. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim younger than 13). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to a term of five to 15 years' imprisonment. Defendant appeals as of right. We reverse and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

The prosecutor charged that defendant had engaged in criminal sexual contact with his daughter, DT, between January 1, 1996 and January 1, 1997. At that time, defendant resided on Underhill Street in Grand Rapids with his wife, Shawnda Helmbrecht, their two children, and BH, Helmbrecht's daughter by a previous marriage. DT and her younger sister, ST, lived elsewhere with their mother and visited defendant on alternate weekends. According to DT's trial testimony, the sexual contact occurred every weekend night that she spent in defendant's home. DT, who had reached 16 years of age at the time of trial, estimated that the sexual contact allegedly occurred "from when I was very little to like five or six."

DT recounted that during weekend visits with defendant, she and BH, her stepsister, always slept in the top of a bunk bed, and defendant's two younger children slept in the bottom bunk and a crib. DT testified that defendant enforced three household rules: DT had to sleep on the side of the top bunk bed "furthest from the wall," she could not wear underwear to bed, and the children were not permitted to go upstairs or into the kitchen. DT described that defendant nightly entered the bedroom shared by the four children, lifted her nightgown, and touched her vagina. These revelations first emerged in 2006, as DT confessed to her adoptive parents that she had forged her adoptive father's name on a school document.

Before trial, the prosecutor notified the defense that he intended to introduce evidence of defendant's prior sexual misconduct pursuant to MCL 768.27a and MRE 404(b). The evidence the prosecutor sought to introduce consisted of defendant's 2002 guilty plea to having touched the breast of BH, his stepdaughter, for sexual gratification. Over defendant's objection, the trial court ruled that it would permit the prosecutor to introduce "a record of conviction" and defendant's statements about the prior acts. The trial court further observed that the prosecutor "has the option of calling … the victim. … But in any event, I don't see there's any requirement here that [BH] has to be called or that she is the only person that can be called to satisfy the statute."

The prosecutor's case depended on the jury's acceptance of DT's credibility concerning events that had occurred more than a decade earlier, when DT was a young child. Evidence regarding the household "rules," supplied solely by DT, buttressed her recollection of the abuse. In the prosecutor's opening statement, he apprised the jury of defendant's household "rules," explaining that the jurors would learn about "really some unusual rules around" defendant's house. Those rules included that DT and BH "were not allowed to wear underwear" when they went to bed at night. The prosecutor emphasized:

> I submit to you when you begin to pull the facts together and begin to consider the rules around the defendant's house and the young little girls weren't allowed to wear underwear when they went to bed, when you hear that the defendant had done the same thing to his stepdaughter, when you hear and listen to [DT] describe to you what the defendant did—and I will remind you of the jury instruction which indicates, if you sit and listen to [DT] and you believe her testimony and it convinces you beyond a reasonable doubt on those three elements I have to prove, we need to present nothing else.

In defense counsel John Grace's four-paragraph opening statement, he responded that "a lot of this evidence will be disputed." Grace asserted, "The prosecutor's brought up, for instance, certain rules that he believes existed in this household. These rules didn't exist. You'll hear from people who lived in the household. They'll tell you what rules did exist." Thus, from the outset of the trial, the household "rules" assumed critical evidentiary significance.

The trial proceeded with the testimony of DT and her adoptive parents, who described the circumstances surrounding DT's 2007 disclosure of defendant's acts of sexual contact between 1996 and 1997. A Michigan State Police officer then testified about defendant's 2002 admission that he had touched BH's breast. The next day, the prosecutor advised the court that he "just found out on the day of trial that we were having trouble locating and did eventually locate [BH] in Minnesota." The prosecutor proposed that the trial court admit BH's testimony by telephone, adding that defense counsel "indicated that a phone hookup would be acceptable to him." Grace confirmed the prosecutor's statements, and continued,

> [The prosecutor] explained to me his issues regarding finding [BH] and getting her here, and I myself related my same issues, trouble getting Shawnda [Helmbrecht] here, and we both had agreed, given the circumstances, kind of split the issue—and I don't know if that's a good term. We've come to a mutual

agreement that phone connection testimony would be the right way to deal with the situation at hand, Your Honor.

The trial court rejected counsels' telephone testimony proposal, explaining that without accompanying video images, a jury could not fully assess the witness's credibility and the court could not verify the identity of the person speaking. The trial court further explained, "All I'm saying to counsel today is, if they can show me authority where a disembodied voice can be presented to a fact-finder at trial in circuit court on a federal [sic] case, I'll certainly permit it." The trial court also proposed that its "relatively new courtroom" possessed audio-visual capability, and that "the confrontation of a witness can be done wherever anyone has the equipment necessary to do it, or I'm told Kinko's, which is a business, does have this capability to have an audio-visual conference. We can provide that." Grace responded, "I think, Your Honor, if I may, we should get a hold of them and get them to a Kinko's."

When trial resumed, the prosecutor presented testimony from Grand Rapids Police Detective Kelli Braate, who had interviewed DT, her adoptive parents, and defendant. The prosecutor elicited from Braate that in the course of her conversation with defendant, he denied having touched BH's breast for sexual gratification notwithstanding that he previously pleaded guilty of this offense, disputed that he enforced any house "rules," and refused to admit that he had sexually abused DT. During Braate's testimony, the prosecutor offered into evidence a certified copy of defendant's 2002 conviction involving BH and the transcript of his guilty plea. Although Grace voiced no objection to the introduction of either exhibit, the trial court admitted only the certified copy of defendant's conviction, reserving a decision on the admissibility of the guilty plea transcript. A Kent County Sheriff's deputy then supplied additional evidence concerning defendant's 2002 statement that he had touched BH's breasts. The prosecutor rested, and the trial court read the jury the following stipulation:

> The stipulation between the lawyers is that [BH] was the complainant in the 2002 criminal case, being Case Number 02-09614-FH, and was approximately nine years of age at the time of the offense.
>
> Also that Shawnda Coby is the mother of [BH].
>
> That [DT] had a urinary tract or yeast infection and was told by Dennis Clark that she should not wear underwear until the infection cleared up.
>
> This is the only knowledge that Shawnda Coby has regarding any statement that the defendant may have made regarding the children wearing underwear to bed.
>
> Finally, that the bathroom in the home located at 911 Underwood (sic) was located in the upstairs of the residence.

After reciting the stipulation, the trial court expressed that it would not admit the guilty plea transcript because most of it had no relevance to this case, and defendant's admissions in the

transcript qualified as "duplicative or cumulative." Grace introduced "photographs of the children at the time in issue here in October of '95, showing the children at the house wearing their pajamas."[1] The defense then rested without calling any witnesses. Consequently, no evidence refuted the "rules" that the prosecutor claimed governed the children's lives in defendant's household.

The jury convicted defendant as charged. Subsequently, the trial court granted defendant's motion for a *Ginther* hearing. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Five witnesses testified at the *Ginther* hearing: Grace, Shawnda Helmbrecht, Helmbrecht's mother Annette Coby, Helmbrecht's sister Anna Coby, and defendant. Helmbrecht recalled that between 1996 and 1997, she and defendant lived on Underhill with their two children and BH, and that for "about seven . . . [or] eight months" Anna Colby and her three children also shared the Underhill home. Helmbrecht added, "I also had my mother there for about a year." Helmbrecht related that Anna Coby slept on the living room floor near the bedroom door, "so, in order to get into the kids' bedroom, we would have to step over" her. Helmbrecht denied that anyone imposed "set rules" on where the children slept or that any rule compelled DT "to go to bed without underwear." Helmbrecht averred, "Most of the time [the children] had feet in the pajamas in the wintertime and sometimes night clothes, but always underclothes with the nightgowns," and that the children had permission to go upstairs to use the home's only bathroom.

Helmbrecht recounted that Grace had "informed me that he was going to subpoena my sister, my mother, and myself to come to court." She continued,

> The first conversation I recall was when he contacted me to get my mother's name, address, and phone number as well as my sister Anna's address and phone number and stuff. He had also called me another time to inform me that it was possible the prosecuting attorney was going to be calling [BH] in to be a witness on their side, and he wanted to know if [BH] could testify about her case.

When the trial court refused to permit Helmbrecht to testify by telephone, she attempted to arrange to give testimony by video from a courthouse in Fergus Falls, Minnesota. However, the Fergus Falls court personnel told Helmbrecht that the Kent County court "had to set up the video conference." Helmbrecht maintained that she advised Grace that "he had to set up the conference," but that he never did so. Although Helmbrecht testified that she could not afford voluntary travel to defendant's trial, she asserted that if she had received a subpoena she would have appeared, "just like I came to this trial [evidentiary hearing]."

Annette Coby recalled that the girls would flip a coin to decide who slept on the outside of the top bunk, and that "[a]ctually all four of them liked to sleep on the bottom bunk because it was a full size bunk." Coby confirmed Helmbrecht's testimony that the girls "always wore nighties" in the summer and either warm pajamas or "footy pajamas," and always wore

[1] The record does not contain this photographic evidence.

underwear under their pajamas. Anna Coby remembered that she and her children lived with Helmbrecht and defendant for "probably in between five and seven months" at the house on Underhill, and that her period of residence on Underhill coincided with some visits by DT. Anna Coby described that anyone who entered the children's bedroom at night "would have to step over me." Anna Coby denied that defendant had forbidden the children to wear underwear. Annette Coby and Anna Coby both testified that Grace had never contacted them.

The prosecutor questioned Helmbrecht and the Cobys about the extent of their awareness that defendant had touched BH's breast. Helmbrecht "believe[d] something happened, but . . . [was] not 100 percent sure what happened." Annette Coby denied knowing that defendant had ever admitted fondling BH's breast, and expressed disbelief that defendant had molested either BH or DT. Anna Coby also disbelieved that any sexual contact between BH and defendant had occurred. Defendant testified that he had given Grace the names of the adults who shared the Underhill home during the period that DT visited, including Annette Coby and Anna Coby. Grace disputed that defendant had supplied him with information regarding Annette Coby or Anna Coby, and declared his understanding that, aside from defendant and Helmbrecht, "no other adults" had lived at the Underhill address.

In a bench opinion, the trial court observed that Annette Coby and Anna Coby did not recall accurately or specifically the exact time frame of their residence in the Underhill home. Concerning Anna Coby, the trial court opined, "She was the one who was the self-described guardian at the gate, but I don't believe that her testimony had much credibility because of the softness of its recall and, quite frankly, wouldn't have made a difference." The trial court similarly rejected the value of Annette Coby's testimony: "Annette Coby … was a woman by her own admission, was worked to the bone, and I don't believe would have anything measurably important to offer even if you took all the testimony she gave in the light most favorable to the defendant in this case." The trial court found that Grace "made a conscious decision with regard to defense strategy, namely, to attack the testimony of the detective and the credibility of the victim." The trial court further explained and concluded as follows:

> He made a choice based on knowing about the prior conviction of the defendant with [BH], that in calling these woman (sic) for whatever help they could give to the defendant's case, they would still be the same people who denied the obvious, the defendant's conviction of CSC with [BH], which was legitimately admissible and, therefore, their credibility would have been fundamentally undercut.
>
> And so my conclusion is in this case that an attorney licensed to practice law, an attorney in good standing, with training and experience, made a reasonable judgment and a conscious decision on whether certain witnesses would be beneficial to his client and, based on the testimony of Annette and Anna Coby and Shawnda Helmbrecht—but I am convinced there is nothing there which would have assisted the defendant in his defense.

The court noted its view that at trial defendant had "received a substantial bargain" with the introduction of the stipulation, "which basically was by its nature hearsay" introduced without any cross-examination, and reiterated that "the decision of counsel in this case was reasoned, sensible, and I simply don't see any basis upon which I can grant the motion for a new trial."

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first contends that Grace was ineffective for neglecting to properly investigate exculpatory evidence that Annette Coby and Anna Coby could have supplied and failing to call Helmbrecht and the Cobys as trial witnesses. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews for clear error a trial court's findings of fact, and considers de novo questions of constitutional law. *Id*.

"[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689.

A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

> "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [*Wiggins v Smith*, 539 US 510, 521; 123 S Ct 2527; 156 L Ed 2d 471 (2003), quoting *Strickland*, 466 US at 690-691.]

"The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

Generally, defense counsel's "failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Payne*, 285

Mich App at 190 (internal quotation omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

A. FAILURE TO INVESTIGATE DEFENDANT'S PRIMARY DEFENSE

Defendant asserts that Grace was ineffective for not contacting the Cobys and never learning that they could rebut DT's household "rules" testimony. At the *Ginther* hearing, Grace testified inconsistently about his awareness that Annette Coby and Anna Coby had lived in the Underhill home during some of DT's visits. In the course of examination by defendant's appellate counsel, Grace claimed that he recalled having spoken to defendant "about the living arrangements," and admitted that the names Annette Coby and Anna Coby sounded familiar. Grace initially avoided answering directly whether defendant or Helmbrecht had given him the Cobys' names:

> *Q.* So Dennis never told you that potential witnesses might involve his ex-mother-in-law and his ex-sister-in-law?
>
> *A.* He never told me about any other adults that resided there. I've never heard about any other adults residing there.
>
> *Q.* How about the ex-wife? Did she ever mention that there were other adults living in the house?
>
> *A.* No.
>
> *Q.* So if there were to be any testimony that you called the ex-wife and asked for names and phone numbers of the ex-mother-in-law and ex-sister-in-law, that would be incorrect?
>
> *A.* I don't know.
>
> *Q.* Are you saying it did not happen, or you simply don't remember?
>
> *A.* I'm saying I can't—I can testify to what I know. I can't say what other testimony was—
>
> *Q.* Okay.
>
> *A.* —or make a judgment on it. But the best of my recollection is that he resided there with his wife and the children, and at times there were four children there mainly on weekends, every other weekend.
>
> *Q.* You never spoke to any individuals named Anna and Annette?
>
> *A.* Not that I recall.

Later in Grace's testimony, he denied that defendant had provided him with any information regarding the Cobys.

The trial court did not make a specific finding about whether defendant or Helmbrecht told Grace of the Cobys' presence in the home when DT visited, or whether Grace's failure to investigate the potentiality that the Cobys could offer exculpatory evidence qualifies as ineffective assistance of counsel. Irrespective whether defendant and Helmbrecht somehow neglected to advise Grace of the presence of two other adults in the Underhill home who could rebut DT's "rules" testimony, Grace had a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 691. "An attorney's duty of investigation requires more than simply checking out the witnesses that the client himself identifies." *Bigelow v Haviland*, 576 F3d 284, 288 (CA 6, 2009). Here, a reasonable defense counsel would have recognized the need to corroborate defendant's assertion that the "rules" did not exist, and would have affirmatively sought information concerning other potential witnesses. Reasonable defense counsel would have understood the particular need for corroboration under the circumstances of this case, in which defendant's prior conviction sharply limited his ability to testify on his own behalf. Reasonable defense counsel also would have solicited basic information about the presence of other adults in the Underhill home during the period in question, including the names of defendant's cohabitants. Stated differently, even had defendant failed to *volunteer* that other adults shared the Underhill home at the time in question, Grace nevertheless bore a responsibility to inquire with regard to the presence of anyone who could verify that the "rules" did not exist. Had Grace performed in a minimally adequate fashion, it defies common sense that both defendant and Helmbrecht would have neglected to disclose the Cobys' identities. Grace's failure to seek corroborating evidence or interview the Cobys did not constitute a reasonable strategic choice, but a negligent one that fell below the standard of a reasonably competent attorney practicing under prevailing professional norms. And if Grace actually knew of the Cobys' residence on Underhill and their willingness to rebut the "rules" evidence, he unreasonably failed to present their testimony.

B. PREJUDICE ARISING FROM DEFICIENT INVESTIGATION

In *Strickland*, 466 US at 694, the United States Supreme Court adopted the following standard governing the prejudice prong of an ineffectiveness claim: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." The Supreme Court further instructed, "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id*. at 695. In reviewing the prejudice aspect of a defendant's claim, we apply the clear error standard to the trial court's factual findings, but review de novo the trial court's constitutional conclusions. *LeBlanc*, 465 Mich at 579.

We reject the trial court's determination that Grace's deficient investigation of the Cobys' knowledge and potential testimony did not prejudice the defense. That DT's credibility was crucial to the prosecutor's case cannot be overstated. Defendant's primary defense was to rebut DT's recollection of the "rules" governing the sleeping arrangements on Underhill, and the Cobys could have markedly strengthened this defense. Although the Cobys' uncertainty with respect to the exact dates of their residence on Underhill may have diminished their credibility to some degree, this consideration cannot absolve Grace of his failure to investigate whether they had knowledge helpful to the defense. Without having ever spoken to the Cobys, Grace lacked

any basis for a strategic decision regarding their persuasiveness, and thus could not possibly have made a strategic decision to opt against calling them as witnesses. Grace's failure to interview these witnesses and substantiate his client's primary defense left defendant without any effective method of challenging DT's trial account.

We further reject the notion that we can say as a matter of law that a jury would have entirely disregarded the Cobys' testimony about the nonexistence of the household "rules" simply because they could not specifically identify the months and years in which they resided on Underhill. Both witnesses testified without equivocation that they lived with defendant and his family during a period when DT visited. Helmbrecht confirmed this testimony. The inability of the Cobys to pinpoint the precise dates of their time at the Underhill address may have highlighted the inherent untrustworthiness of DT's testimony regarding events that occurred a decade earlier, when she was five- or six-years-old. But more importantly, "it is clear that our Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence." *Ramonez v Berghuis*, 490 F3d 482, 490 (CA 6, 2007). "The actual resolution of the conflicting evidence, the credibility of witnesses, and the plausibility of competing explanations is exactly the task to be performed by a rational jury, considering a case presented by competent counsel on both sides." *Matthews v Abramajtys*, 319 F3d 780, 790 (CA 6, 2003).[2] Although the jury may have viewed the Cobys' recall as unreliably "soft," as did the trial court, a reasonable probability exists that the Cobys' strong repudiation of any "rules" governing the children's sleeping arrangements would have created a reasonable doubt concerning defendant's guilt. Because the Cobys could have supplied defendant with a substantial defense otherwise absent in Grace's presentation, a reasonable probability exists that the result of defendant's trial would have differed had the Cobys testified.[3]

C. FAILURE TO PRESENT SHAWNDA HELMBRECHT'S TESTIMONY

Indisputably, Shawnda Helmbrecht lived with defendant when DT visited between 1996 and 1997. Helmbrecht unequivocally denied that any "rules" required that DT occupy the outside of the top bunk bed or sleep without underwear. Because the prosecutor's case hinged

[2] We respectfully disagree with the dissent's opinion that "review of a *Strickland* ineffective assistance claim in the context of a *Ginther* hearing" mandates that this Court adopt the trial court's findings concerning the credibility of witnesses whose testimony was not presented to a jury. *Post* at 5. Here, the trial court's determination that the Cobys lacked credibility amounts to a legal conclusion that defendant failed to establish a reasonable probability of a different outcome. We review de novo this conclusion of constitutional law. *LeBlanc*, 465 Mich at 579. Moreover, the Sixth Amendment "prohibit[s] judges from weighing evidence and making credibility determinations, leaving these functions for the jury." *Barker v Yukins*, 199 F3d 867, 874 (CA 6, 1999).

[3] Furthermore, we disagree with the trial court's view that the Cobys' expressions of disbelief at the *Ginther* hearing about defendant's molestation of BH supported Grace's decision not to call them as witnesses. The Cobys' *knowledge* of whether defendant had pleaded guilty of having engaged in sexual contact with BH did possess relevance regarding their credibility. But if defendant did not offer their testimony as character witnesses at trial, their *opinions* concerning defendant's guilt or innocence of the prior offense would be inadmissible. MRE 701.

entirely on DT's credibility, Helmbrecht's contradictory testimony would have strongly supported defendant's primary defense. Under these circumstances, Grace performed ineffectively by failing to subpoena Helmbrecht's attendance at trial. A reasonably competent attorney would have recognized the importance of Helmbrecht's testimony and would have made a substantial effort to procure her attendance at trial.

The events that unfolded after the trial court refused to admit the telephone testimony proposal further illustrate Grace's lack of diligence. The trial court offered Grace the opportunity to present Helmbrecht's testimony by videoconference, and Helmbrecht performed the legwork to accomplish a videoconference originating at the Fergus Falls courthouse. However, even after expressing, "I think, Your Honor, . . . we should get a hold of them and get them to a Kinko's," Grace neglected to arrange for Helmbrecht's testimony by video link.[4] This omission qualifies as particularly egregious in light of Grace's opening statement promise to the jury that "[t]hese rules didn't exist. You'll hear from people who lived in the household. They'll tell you what rules did exist." Grace's failure to present any such evidence severely wounded defendant's case.

Nor did Grace's entry into the stipulation concerning Helmbrecht's testimony mitigate the unreasonableness of his conduct. Remarkably, the stipulation (1) referred to Helmbrecht by an incorrect last name, (2) omitted her belief that no rules existed regarding sleeping arrangements or underwear; and (3) incorrectly identified the street on which defendant lived. In pertinent part, the stipulation asserted:

> That [DT] had a urinary tract or yeast infection and was told by Dennis Clark that she should not wear underwear until the infection cleared up.
>
> This is the only knowledge that Shawnda Coby has regarding any statement that the defendant may have made regarding the children wearing underwear to bed.

This summary hardly conveys the central facts Helmbrecht emphasized at the *Ginther* hearing, namely that the children either wore pajamas with feet in them or other nightclothes, but always wore underwear. The stipulation communicated an entirely different message, that Helmbrecht lacked any meaningful knowledge about the "rules." Contrary to the trial court's characterization of the stipulation as a "bargain" for defendant, the stipulation likely harmed or undermined defendant's case because it did not address his primary defense, leaving hollow and unfulfilled Grace's promise that "people who lived in the household" would refute DT's testimony about the "rules."

Had Helmbrecht testified at defendant's trial, a reasonable probability exists that the jurors would have harbored or entertained reasonable doubts about the accuracy of DT's recollections. As the Sixth Circuit explained in *Brown v Smith*, 551 F3d 424, 434-435 (CA 6,

[4] Assuming Grace knew that Helmbrecht lived in Minnesota, as he should have known, Grace could have made arrangements for her to testify via "two-way interactive video technology" under MCR 6.006(C)(2).

2008), "Where there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt." The absence of any trial evidence refuting DT's account rendered Grace's ineffectiveness particularly prejudicial. See *Clinkscale v Carter*, 375 F3d 430, 445 (CA 6, 2004) ("Clinkscale's inability to provide any supporting testimony for his strongest defense must be considered especially damaging and prejudicial.").

D. ADDITIONAL INDICIA OF INEFFECTIVENESS

Our review of the record reflects that Grace also appreciably compromised defendant's case by repeatedly apprising the jury that he served as defendant's appointed counsel, and by representing that his professional efforts were "required" by the rules of professional conduct. When Grace commenced his voir dire of the potential jurors, he offered the following introduction: "My name once again is John Grace of the Kent County Office of the Defenders. I've been appointed to represent Mr. Clark. That job entails representing him as zealously as I can." Within the first minutes of his closing argument, Grace repeated his introductory explanation:

> My name is John Grace. I work for the Kent County defenders office. I've been appointed. I represented Mr. Dennis Clark here throughout this trial. According to the rules of professional conduct, my job is to zealously represent Mr. Clark before you in the course of this trial. That's my job. That's what I've been trying to do.

The prosecutor responded to Grace's statement in rebuttal:

> First, he mentioned twice—at least twice, his duties in this, and he's right. The canons of ethics that govern our prosecution indicate that he has to zealously represent the interests of his client regardless of what the facts are.
>
> My role is different. The cannons [sic] of ethics indicate that my duty is to seek the truth. Etched in stone, that is my role here, to put witnesses on, to question them, allow them to be cross-examined, and allow you to assess their credibility.

Grace raised no objection to this argument, despite this Court's holding in *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004), that "by telling the jury that the prosecution has a duty to seek the truth while the defense is concerned only with advancing a story in an effort to exonerate the defendant of the charge, the prosecution improperly invokes the prestige of the office."

Grace's gratuitous and repeated mentions that defendant had appointed counsel, combined with his entirely unnecessary explanations that his "job" mandated zealous representation, served only to demonstrate that Grace lacked any true conviction for defendant's cause. The Sixth Circuit has characterized the making of comments similar to Grace's as a "highly questionable practice." *Wiley v Sowders*, 647 F2d 642, 644 n 6 (CA 6, 1981). And in *Goodwin v Balkcom*, 684 F2d 794, 806 (CA 11, 1982), the Eleventh Circuit declared that

"reminding a jury that the undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused." See also *Thompson v Haley*, 255 F3d 1292, 1304 (CA 11, 2001), quoting *Strickland*, 446 US at 687 ("Counsel's statements in closing, as well as Counsel's disclosure to the jury that they were court appointed, hardly comport with the fundamental duty of loyalty to a client and of ensuring 'that the adversarial testing process works to produce a just result under the standards governing decision.'").

Grace's announcement that he represented defendant only because he had a "job" to do underscores the ineffective assistance he provided defendant. Rather than performing "zealously," Grace failed to even minimally investigate defendant's primary defense, neglected to arrange for the testimony of a witness he knew would support the primary defense, and reneged on his vow to present evidence that the "rules" at the heart of the prosecutor's case simply did not exist. We conclude that Grace's conduct lacked any legitimate strategic basis and fell outside the broad bounds of acceptable professional judgments. Furthermore, but for Grace's errors, a reasonable probability exists that the outcome of defendant's trial would have differed. On the basis of Grace's ineffectiveness, we reverse his conviction and sentence.

III. ADDITIONAL APPELLATE ISSUES

We briefly address defendant's additional arguments in his brief on appeal to offer guidance to the parties and the trial court on remand. Defendant posits that the trial court's admission of evidence concerning his prior sexual contact with BH was improper propensity evidence under MRE 404(b), and unconstitutional if admitted under MCL 768.27a. Because the trial court did not rely on MRE 404(b) in admitting evidence of the prior sexual contact, we decline to consider this issue. However, with respect to defendant's assertion that "MCL 768.27a . . . is an unconstitutional ex post facto law as applied to" him, as defendant recognizes this Court already has concluded otherwise:

> When a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b). In many cases, it allows evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted in this limited context. However, the altered standard does not lower the quantum of proof or value of the evidence needed to convict a defendant. In this case, for example, defendant could have been tried and convicted before this statute was enacted solely on the basis of his daughter's proposed testimony. That same testimony, if presented as it appears in the record, remains legally sufficient to support his conviction at his upcoming trial. Therefore, the standard for obtaining a conviction against defendant has not changed, and the application of MCL 768.27a to this case does not violate the Ex Post Facto Clause [Const 1963,l art I, § 10]. [*People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007).]

Because the doctrine of stare decisis and the Michigan Court Rules obligate us to adhere to *Pattison*'s analysis of this issue, we conclude that defendant's constitutional claim lacks legal merit. MCR 7.215(C)(1), (J)(1).

Defendant lastly suggests that the prosecutor engaged in misconduct by appealing in the course of his rebuttal closing argument to the jury's emotions or sense of civic duty. We review a defendant's claim of prosecutorial misconduct on a case-by-case basis, considering the challenged remarks "in context and . . . in light of defense arguments and the relationship they bear to the evidence admitted at trial to determine whether a defendant was denied a fair and impartial trial." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

Defendant complains of the following prosecutorial comments:

> What hope does [DT] have? What hope does [BH] have? What hope does any child have if we take the position that Mr. Grace said and wants you to adopt here, and that is, you know, [DT], you held on to this deep, ugly, dark secret a little too long. You can't remember where the lights were in the room, and you held on to it so long that even your dad can't remember what color the house was.
>
> If we take that position, what hope do they have? . . . .

"A prosecutor may not make a civic duty argument that appeals to the fears and prejudices of the jurors because this injects issues broader than the guilt or innocence of the accused into the trial." *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). "Appeals to the jury to sympathize with the victim [also] constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). After reviewing the prosecutor's comments in light of defense counsel's closing argument, during which he stressed DT's inability to recall some of the circumstances surrounding the assaults, we find that the prosecutor properly responded to defense counsel's attacks of the victim. Even assuming impropriety in the prosecutor's challenged argument, the trial court cured any prejudice by instructing the jury that the prosecutor's remarks were not evidence. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher